

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

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CARL JESSEL, DIANE and)
JOHN YORK and TWYLLA and)
CHARLES HOCH,)
Petitioners,)
vs.)
LINCOLN COUNTY,)
Respondent.)

LUBA No. 85-078
FINAL OPINION
AND ORDER

Appeal from Lincoln County.

Max M. Miller, Jr., Portland, of Garvey, Schubert, Adams & Barer, filed the Petition for Review and argued on behalf of Petitioners. With him on the brief was Walter W. McMonies, Jr., Portland, of McMonies & Whitlow.

M. E. Walter, Waldport, filed the response brief and argued on behalf of Respondent, Carl Collins.

No appearance by Lincoln County.

KRESSEL, Chief Referee; BAGG, Referee; DuBAY, Referee;

REMANDED 04/04/86

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 NATURE OF DECISION

2 This appeal concerns an order of the Lincoln County Board
3 of Commissioners approving an alteration of a nonconforming
4 use. The approval allows Respondent Collins to add a licensed
5 automobile wrecking yard to a nonconforming use.

6 FACTS

7 Respondent Collins owns a 37 acre tract approximately four
8 miles east of Highway 101 in Lincoln County. The property is
9 zoned Agricultural Conservation (20 acre minimum lot size).
10 The county found that prior to adoption of zoning in 1962, a
11 small portion of the property was used for a construction/
12 excavating business and a metal scrapping business. The county
13 considers these to be nonconforming uses in the Agricultural
14 Conservation Zone. The businesses are conducted in a 50' by
15 80' shop and an adjacent yard.

16 In June, 1985, the county planning commission conditionally
17 approved Respondent Collins' request to establish a licensed
18 automobile wrecking yard on an additional 1 acre of the
19 property. However, the decision authorized the alteration for
20 18 months only. Upon expiration of that period, further review
21 and approval from the county were required.

22 Respondent Collins appealed the conditional approval to the
23 county governing body. At the hearing on the appeal, neigh-
24 boring property owners objected to the alteration, charging
25 that it would have adverse environmental impacts. At the
26 conclusion of the hearing, however, the requested alteration

1 was approved. The governing body's final order deletes the 18
2 month limitation imposed by the planning commission. However,
3 limitations on hours of operation and storage of material, as
4 well as screening requirements, are imposed.

5 FIRST AND SECOND ASSIGNMENTS OF ERROR

6 The county zoning ordinance, consistent with state law,
7 allows the continuation of any lawful nonconforming use.
8 Section 1.1701(1)(a), Lincoln County Zoning Ordinance; ORS
9 215.130(5). The ordinance also provides that a nonconforming
10 use may be altered under certain circumstances. Section
11 1.1701(2) states:

12 "Alteration of a nonconforming use may be permitted to
13 the extent such alteration is necessary in order to
14 continue the use. Alteration of a nonconforming use
15 shall be permitted when necessary to comply with any
16 lawful requirements for alterations in the use. A
17 change of ownership, control or occupancy of a
18 nonconforming use shall be permitted."

19 The term "alteration" is defined in the county ordinance as
20 follows:

21 "As used in Section 1.1701 'alteration' of a non-
22 conforming use or structure includes:

23 "(A) a change in the use of no greater adverse impact
24 to the neighborhood; and

25 "(B) a change in the structure or physical improve-
26 ments of no greater adverse impact to the
neighborhood." Section 1.1701(1)(b) Lincoln
County Zoning Ordinance. See also ORS 215.130(9).

The county's decision interprets the ordinance to allow
approval of the proposed alteration if "the change in structure
or physical improvements is of no greater adverse impact to the

1 neighborhood" (i.e., in comparison with the present nonconform-
2 ing use). Record at 6. The final order indicates this was
3 considered to be the sole standard governing the request. In
4 the first assignment of error, Petitioners claim the county
5 misinterpreted the ordinance by disregarding in Section
6 1.1701(2). As noted above, that section allows approval of an
7 alteration "...to the extent necessary in order to continue the
8 use" (emphasis added). The petition states:

9 "The county's interpretation of its ordinance is
10 unreasonable. An alteration as defined in the
11 ordinance is a change of use with no greater adverse
12 impact. This definition is to be distinguished from
13 the requirements for approval of an alteration. The
14 ordinance allows the county to permit an alteration
15 when the alteration is necessary in order to continue
16 the use. It mandates county approval of an alteration
17 when the alteration is necessary in order to comply
18 with a lawful requirement. Not all alterations, that
19 is not all non-adverse changes in use, are to be
20 permitted. Only those which are necessary. In other
21 words, the ordinance allows an alteration when the
22 proposed change of use meets the definition of an
23 alteration (results in no adverse impact) and meets
24 one of the two necessity requirements." Petition at
25 10, (emphasis in original).

18 In the second assignment of error, Petitioners assert that,
19 even if the county's ordinance interpretation is correct, state
20 law imposes a more restrictive test for approval of the
21 alteration. In support of this argument, petitioners rely on
22 ORS 215.130(5). The statute provides:

23 "(5) The lawful use of any building, structure or
24 land at the time of the enactment or amendment of any
25 zoning ordinance or regulation may be continued.
26 Alteration of any such use may be permitted to
reasonably continue the use. Alterations of any such
use shall be permitted when necessary to comply with
any lawful requirement for alteration in the use. A

1 change of ownership or occupancy shall be permitted."

2 Although the zoning ordinance and state statutes lend some
3 support to the county's interpretation, Petitioners' attack
4 must be sustained. The central idea of the ordinance and the
5 parallel statute is that a lawful nonconforming use may be
6 "continued." The right recognized by the law is limited in
7 scope. The supreme court stated in Polk County v. Martin, 292
8 Or 76, 636 P2d 952 (1981):

9 "The nature and extent of the prior lawful use
10 determines the boundaries of permissible continued use
11 after the passage of the zoning ordinance."

12 Further, only alterations reasonably necessary to continue the
13 nonconforming use may be approved by local authorities. This
14 is the impact of the county ordinance and ORS 215.130(5)

15 The county's order does not give effect to the limitations
16 imposed by law on the alteration of a nonconforming use. The
17 order broadens the right to continue a nonconforming use by
18 allowing its diversification or expansion. Thus, the order
19 allows automobile wrecking on the property--clearly a
20 diversification of the present nonconforming uses--solely on
21 the ground that the additional activity will not increase the
22 negative environmental impacts. Under the governing law,
23 however, the finding of "no greater adverse impact" is not a
24 sufficient basis for approving the alteration. The alteration
25 must also be necessary to continue the current nonconforming
26 use(s). See Section 1.1701(2), Lincoln County Zoning
Ordinance; ORS 215.130(5).

1 The county's decision does not address the question of
2 whether establishment of an automobile wrecking yard is
3 necessary to continue the existing nonconforming use(s)
4 operated by Respondent Collins. As a result, the order
5 misconstrues the county ordinance and state law. A remand is
6 in order.

7 The first and second assignments of error are sustained.

8 THIRD ASSIGNMENT OF ERROR

9 Petitioners next point out that, while the approval
10 standard requires a finding of "no greater adverse impact," a
11 portion of the county's order concludes that:

12 "19. Any impact on the neighborhood of the alteration
13 of the area to include a licensed auto-wrecking yard
14 from the existing construction/recycling operation
15 will be ameliorated by appropriate conditions and
16 regulations attached to the proposed altered use."
17 Record at 7.

18 Petitioners claim this finding is insufficient because

19 "...by making the finding that greater adverse impact
20 may be ameliorated, the county has admitted that
21 greater adverse impact will occur. No doubt the con-
22 ditions imposed by the county...will make the greater
23 adverse impact more tolerable than they otherwise
24 might be, but they do not negate the creation of a
25 greater adverse impact." Petition at 14 (emphasis in
26 original).

 We reject this attack because it fails to place the quoted
finding in context. Immediately after the finding cited by
Petitioners is the following language in the county's order:

 "Now, therefore, the board CONCLUDES as follows:

 "That the proposed alteration of the nonconforming use
on the subject property to include a licensed auto-
wrecking yard as submitted by the applicants when

1 operated in compliance with the following conditions
2 will result in no greater adverse impact to the
3 neighborhood...." Record at 7 (emphasis added).

4 Given the foregoing, it is clear that the county made the
5 necessary determination on the impact issue, viz. that the
6 proposal, when operated in compliance with the final order,
7 would result in no greater adverse impact to the neighborhood.
8 The reference to "amelioration" of impact, on which Petitioners
9 rely, does not nullify the determination.

10 Petitioners do not contend that the county could not employ
11 conditions of approval as a means of assuring that the proposal
12 would satisfy the impact standard. Their sole contention in
13 this assignment of error is that the county's order reveals
14 that the alteration will violate the standard. As shown above,
15 however, this characterization of the final order is incorrect.

16 The third assignment of error is denied.

17 FOURTH ASSIGNMENT OF ERROR

18 Prior to the governing body's final hearing on the
19 proposal, the commissioners visited the property to assess the
20 probable impacts of a wrecking business. Petitioners, who were
21 parties to the hearing, were not notified of the site visit,
22 and were not given an opportunity to comment on the
23 information/impressions derived by the commissioners before the
24 decision was made. They assign these circumstances as
25 procedural error.

26 The record indicates that the commissioners visited the
27 site prior to the hearing at which the final decision was

1 made. Some of the commissioners stated that, based on their
2 observations, the proposed use would not be visible from most
3 neighboring properties. Others did not indicate what, if any
4 determinations they made based on the site visit. It does not
5 appear that parties were allowed to respond to the disclosures
6 made by the commissioners about the site visit.

7 We have held that the failure of decisionmakers to
8 disclose and give parties an opportunity to comment on
9 information obtained during a site visit is error. Friends of
10 Benton County v. Benton County, 3 Or LUBA 165 (1981); Concerned
11 Property Owners v. Klamath County, 3 Or LUBA 182 (1981).

12 Respondents present no reason why we should not apply the rule
13 here. The fourth assignment of error is sustained.

14 The county's decision is remanded.